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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RAY SLAYTON, Plaintiff and Appellant, v. BOXER, ELKIND & GERSON, et al., Defendants and Respondents.	A102050 (Alameda County Super. Ct. No. 782785-7)

Ray Slayton filed a malpractice action against attorneys who represented him in a worker's compensation claim and related third party case. The jury rendered a special verdict finding the attorneys were negligent but this negligence did not cause the damages Slayton alleged, i.e., loss of potential future medical coverage. The trial court entered judgment in favor of the attorneys and denied Slayton's motions for judgment notwithstanding the verdict and for a new trial. On appeal, Slayton claims the trial court erred in ruling he was precluded from seeking emotional distress damages and in denying his post-trial motion for judgment notwithstanding the verdict. Because these arguments have no merit, we affirm the judgment.

BACKGROUND

Slayton suffered work-related injuries to his back in 1985 and 1987. He filed worker's compensation claims for these injuries with State Compensation Insurance Fund (State Fund) and New Hampshire Insurance Company (New Hampshire), respectively. As a result of his claims, Slayton received awards from these insurers of lifetime medical

benefits for treatment of his lower back. In late 1993, Slayton suffered a third traumatic injury to his back when he fell from scaffolding on the job. After firing his previous lawyer, Slayton retained Stewart Boxer, John Anton and the Boxer, Elkind & Gerson firm (collectively, respondents) to handle his past and future worker's compensation claims and to file a third party action regarding the 1993 accident.

Fireman's Fund Insurance Company (Fireman's Fund), the worker's compensation insurer that covered Slayton's third accident, asserted a lien in the third party case for approximately $103,000. On March 22, 1996, at a mediation shortly before the third party action was set to begin trial, respondents negotiated a settlement of the case for $350,000, with an agreement from Fireman's Fund to reduce the amount of its lien to $55,000. Respondents disbursed the $189,500 net recovery from this settlement to Slayton on May 7, 1996.

After the settlement was reached, respondent Anton and Fireman's Fund attorneys conferred on several versions of a draft compromise and release agreement. On one draft, Anton added the following sentence: "Expense incurred by applicant after receipt of settlement funds shall be assumed all by applicant or through prior awards; none by employer or Fireman's Fund Insurance Company. " Anton intended this sentence to alert the worker's compensation judge who would review the settlement to the existence of prior awards in Slayton's favor. However, the word "or" was omitted during the revision process, such that the final compromise agreement stated future expenses would be assumed "by applicant through prior awards." After the settlement agreement was signed, respondents represented Slayton in seeking compensation from State Fund and New Hampshire for Slayton's upcoming back surgery.

In July 1996, Slayton learned he needed to undergo more extensive surgery than had been anticipated. He advised respondents he was unhappy about the fact that all of his medical expenses would not be covered under the recent settlement, and he hired new counsel, James Kneisler, to challenge approval of the settlement before the Worker's Compensation Appeals Board (WCAB). At the WCAB hearing regarding the settlement, Slayton testified that when he signed the compromise and release agreement he did not

understand he risked losing the lifetime medical coverage he previously enjoyed from State Fund and New Hampshire. Nevertheless, the WCAB judge approved the settlement, ruling State Fund and New Hampshire were required to provide coverage for 54.5 percent of future medical care for Slayton's back and Slayton was responsible for paying the remaining portion of such future costs.

On May 6, 1997, Slayton filed a complaint against respondents alleging legal malpractice, breach of fiduciary duty and breach of contract. The case proceeded to jury trial, but the court entered a judgment of nonsuit in favor of respondents, concluding Slayton had failed to show actual, nonspeculative damages resulting from the alleged malpractice. We reversed the judgment in an unpublished opinion filed March 29, 2001. After remand, the parties stipulated to a trial date of September 6, 2002. Less than two months before this trial date, on July 16, 2002, Slayton moved to amend the complaint to correct errors and add a claim for recovery of emotional distress damages. The trial court granted the motion but ruled Slayton could not amend to seek damages for emotional distress.

The matter proceeded to a bifurcated trial in which issues of liability and proximate cause were tried first, with a stipulation that a judicial referee would decide damages at a later date. On December 18, 2002, the jury returned a special verdict finding that respondents were negligent but this negligence was not a cause of Slayton's loss of potential future medical coverage. After the court entered a judgment on the special verdict, on January 23, 2003, Slayton filed motions for judgment notwithstanding the verdict and for new trial, arguing the evidence was insufficient to support the jury's verdict on causation. The trial court denied the motions. The court observed conflicting evidence had been presented on the issue of causation but there was sufficient credible evidence to support the jury's verdict. This appeal from the judgment and post-trial order followed.

DISCUSSION

I. Emotional Distress Damages Are Not Available

Slayton first claims the trial court erred in refusing to allow him to amend his complaint to pursue emotional distress damages. He asserts he was shocked, distressed and anguished upon learning his medical coverage was reduced and he was now responsible for paying nearly 50 percent of his future medical costs. For all practical purposes, this claim has been rendered moot by the jury verdict finding that respondents' negligence did not proximately cause Slayton to suffer any future loss of medical coverage.

In any event, as this court recognized in *Camenisch v. Superior Court*, the "general rule" is well settled "that emotional distress damages are not recoverable when attorney malpractice leads only to economic loss." (*Camenisch v. Superior Court* (1996) 44 Cal.App.4th 1689, 1691, cited with approval in *Erlich v. Menezes* (1999) 21 Cal.4th 543, 555.) This is because the availability of such damages turns upon whether emotional distress is a foreseeable outcome of the attorney's negligence. (See *Pleasant v. Celli* (1993) 18 Cal.App.4th 841, 852 ["Foreseeability is the touchstone of emotional distress analysis"].) Thus, the appellate court held in *Merenda v. Superior Court* that "damages for emotional distress arising out of acts which invade an interest protected by established tort law are recoverable *only if the claimed emotional distress naturally ensues from the acts complained of*." (*Merenda v. Superior Court* (1992) 3 Cal.App.4th 1, 6 (italics added).)

Typically, in civil litigation, the client interest an attorney is hired to protect is primarily economic in nature. (See *Merenda v. Superior Court*, *supra,* 3 Cal.App.4th at p. 10.) "Where the interest of the client is economic, serious emotional distress is not an inevitable consequence of the loss of money and . . . the precedents run strongly against recovery." (*Ibid.*) In contrast to other claims, such as medical malpractice, "[g]enerally, the only foreseeable impact on the plaintiff from an attorney's wrongdoing is an economic loss. It is foreseeable that the plaintiff would be annoyed and inconvenienced by the attorney's failure, for example, to file suit within the applicable statute of

limitations. However, the disappointment one might feel upon learning that counsel has missed a filing deadline falls far short of the shock, fright, mortification, humiliation, grief, anxiety or nervousness which characterize the cases imposing liability for negligent infliction of emotional distress. [Citation.]" (*Pleasant v. Celli*, *supra*, 18 Cal.App.4th at p. 853; cf. *Erlich v. Menezes*, *supra,* 21 Cal.4th at pp. 556-557 [holding emotional distress damages are not available for claims alleging property damages].)

Nevertheless, Slayton contends he was entitled to seek emotional distress damages based on *Holliday v. Jones* (1989) 215 Cal.App.3d 102. The Court of Appeal in *Holliday* distinguished existing precedent to conclude emotional distress damages could be recovered in the legal malpractice context by a client who was wrongly convicted of manslaughter and imprisoned due to his attorney's incompetence. (*Id.* at pp. 104-105, 114-115.) The court contrasted cases in which "the only interest harmed by the attorney's malpractice was a property interest" from Holliday's more "fundamental and personal" interest in liberty. (*Id.* at pp. 115-116.) In this unique situation, which the court acknowledged was sui generis (*id*. at p. 115, fn. 7), emotional distress damages were a foreseeable result of the plaintiff's loss of liberty and could therefore be recovered. (*Id.* at pp. 115, 119.)

Slayton attempts to bring his case within the rubric of *Holliday* by arguing he lost a "fundamental and personal right" (see *Holliday v. Jones*, *supra,* 215 Cal.App.3d at p. 115) to obtain medical treatment. Regardless of whether it is true, as Slayton asserts, that "[o]ur society has come to view the ability to get medical treatment as a fundamental right," there is no indication Slayton has been, or will be, denied medical treatment. At most, respondents' negligence deprived Slayton of a *contractual* right he previously enjoyed to have someone else *pay for* his medical treatment. Semantics aside, the interest allegedly invaded by Slayton's lawyers was purely economic, and thus this case is indistinguishable from a long line of cases holding economic damages are not available. (See, e.g., *Camenisch v. Superior Court*, *supra,* 44 Cal.App.4th at pp. 1697-1698 [no emotional distress damages for erroneous estate planning advice]; *Pleasant v. Celli*, *supra*, 18 Cal.App.4th at 853 [no emotional distress damages for failure to file civil suit

within statutory limitations period]; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1035, 1039 [no emotional distress damages for errors affecting division of assets in dissolution proceeding]; *Merenda v. Superior Court*, *supra,* 3 Cal.App.4th at pp. 5, 10 [no emotional distress damages for failure to prevent claim from being discharged in bankruptcy].)[1]

II. Substantial Evidence Supports Jury Verdict

Next Slayton argues the trial court erred in denying his motion for judgment notwithstanding the verdict because there was no evidence to support the jury's finding that respondents' negligence did not proximately cause his loss of future medical coverage.

"A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. [Citation.] A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.]" (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) "The court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses." (*Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66, 72.) On appeal, "[a]s in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion. [Citations.]" (*Sweatman v. Department of Veterans Affairs*, *supra,* 25 Cal.4th at p. 68.)

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[1] For the first time in his reply brief, Slayton argues that respondents' "outrageous" conduct and breach of fiduciary duties were sufficiently extreme to justify holding them liable for emotional distress damages. Points raised for the first time in a reply brief are not considered unless the appellant shows good reason for failing to raise them before. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) In any event, it appears from the record that "[t]he moral blame attached to [respondents'] conduct is only that which attends ordinary negligence. There is no suggestion of bad faith or reckless indifference to the [appellant's] interest in emotional tranquility." (*Merenda v. Superior Court*, *supra,* 3 Cal.App.4th at p. 11.)

Having reviewed the record of the trial, we agree with the trial court that substantial evidence supports the jury verdict. Even if the jury believed respondents were negligent in drafting the final compromise and release in the third party case, perhaps based on Anton's acceptance of responsibility for the drafting error in the final document, there was ample evidence to show this error did not cause Slayton to lose future medical coverage. In his testimony, Anton described why the settlement with third party defendants and Fireman's Fund entailed a risk that Slayton would lose a portion of his medical coverage from previous insurers. Anton testified he explained this risk to Slayton many times, and tried his best to quantify it, but Slayton chose to accept the risk because he needed the money offered in the settlement. Anton also explained to Slayton that he could avoid any risk of having to pay his own medical expenses if he dismissed the third-party case; however, Slayton chose to pursue the case in hopes of recovering money from the third party defendants. Anton testified he had no doubt in his mind that in entering the mediation agreement Slayton fully understood he was giving up coverage from Fireman's Fund for future medical expenses and, consequently, there was a risk he would not have coverage for 100 percent of his future medical expenses.[2] In addition, respondent Boxer testified he also discussed the risks of the settlement with Slayton, explaining that Slayton would be giving up the right to future medical coverage from Fireman's Fund and it was impossible to tell how much responsibility for coverage the remaining insurers would take. Slayton indicated to Boxer he understood this risk.

Slayton also argued respondents were negligent in disbursing the settlement funds prematurely, before WCAB approval, thereby preventing him from rescinding the settlement agreement once he learned he would lose a large percentage of his future medical coverage. Once again, even if the jury believed this early disbursement constituted negligence, substantial evidence was presented to show this negligence was

[2] At the close of his testimony, Anton responded to several written questions from jurors about his conversations with Slayton and Slayton's understanding of the risk to his future coverage—a fact that suggests this subject was of special concern to some jurors.

not the proximate cause of injury. According to the testimony of Kneisler, the worker's compensation lawyer Slayton hired to replace respondents, if the settlement had been rejected Fireman's Fund would have been entitled to repayment of over $33,000 (the amount by which this insurer had agreed to reduce its lien in the third party case). However, Kneisler explained Slayton did not have enough money left from the settlement to repay Fireman's Fund. The WCAB judge expressly relied on this fact in rejecting Slayton's challenge to the settlement. After noting Fireman's Fund had reduced its lien in consideration for the settlement, the court observed: "It is not seen where the applicant has offered to repay Fireman's Fund the $33,393 reduction as a condition precedent to his request that the Compromise and Release be found inadequate." Thus, the evidence suggests Slayton's own expenditure of the settlement funds was an intervening factor that prevented him from rescinding the agreement.[3]

DISPOSITION

The judgment is affirmed. Respondents shall recover costs on appeal.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.

[3] In his reply brief, Slayton asserts for the first that this court must decide "as a matter of law" how future medical coverage should be apportioned among insurance carriers in a situation like his. This argument is not properly before us and will not be addressed. (See *Keefer v. Keefer* (1939) 31 Cal.App.2d 335, 337 [an appellate court will not undertake to determine abstract questions of law at the request of a party who fails to show that substantial rights will be affected by the decision].)